No. 89-710

IN THE

Supreme Court of the United States

October Term, 1989

ALASKA DIVERSIFIED CONTRACTORS, INC.,
AND FISCHBACH & MOORE OF ALASKA, INC.,
d/b/a ALASKA DIVERSIFIED-FISCHBACH,
A JOINT VENTURE OF ALASKA CORPORATIONS,

Petitioners,

v.

LOWER KUSKOKWIM SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Alaska

PETITIONERS' REPLY BRIEF

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December 7, 1989

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

The School District's opposition brief demolishes straw men, but ignores the critical substance of ADF's argument. As now developed, its own arguments illustrate the due process denial which justifies a grant of *certiorari*.

The following trial court comments, upon its dismissing ADF's claims following the Alaska Supreme Court's first opinion, helpfully introduces the critical problem, *i.e.*, that the Alaska Supreme Court made a finding with respect to an issue that was not litigated through no fault of ADF. The court stated:

> *The Supreme Court of Alaska in this case setting as a* supra *trial (ph) court went ahead and decided a factual*

issue which wasn't even decided in the court below. It found an integrated contract in a contract where there wasn't even an integration clause. Something I've never ever seen happen in any case. But, they did it. I'm bound by it. So be it.

. . .

Having said all that I'm going to say one more thing. In making this decision I do with heavy heart because I agree with the comments of the Seventh Circuit in the EHRET [*Co. v. Eaton, Yale & Towne, Inc.*, 523 F.2d 280 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L.Ed.2d 186 (1976)] case to the effect that what has occurred here amounts to constructive fraud. Mr. Oles' [ADF's counsel] comments are right on the mark. ADF relied on statements made by a government representative as to the way things were going to be at a pre-bid conference, those statements were admitted at trial, and nevertheless, ADF has to eat its losses. *It's not fair. It's constructive fraud. It stinks.* And it's not the way this case ought to be decided, but my hands are tied. So, that's it.

The LKSD motion is granted. ADF's motion — cross-motions are denied. The case is back on its way back to the [Alaska] Supreme Court.

Supp. A. 5, A. 64-65 (emphasis added).

We now review how the School District's distortion of ADF's arguments and the record actually documents the due process denial which prompted the trial court to conclude that the Alaska Supreme Court's result is a "constructive fraud" and "stinks."

II. ARGUMENT IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A. The Respondent's Brief In Opposition Sets Up Straw Men By Misrepresenting ADF's Arguments In Support Of A Grant Of Writ Of Certiorari.

1. *ADF Does Not Dispute That the School District Argued for an Application of the Parol Evidence Rule in its Unsuccessful Pretrial Summary Judgment Motion, in its Trial Brief and Initially Proposed (but Ultimately Withdrawn) Instruction No. 29, but This Does not Change or Overcome the Fact That the School District at Trial Made No Parol Evidence Evidentiary Objections and Approved Jury Instructions Which Were Inconsistent with Any Application of the Parol Evidence Rule.*

The School District "summar[izes]" its argument at p 1:

> Petitioners' due process arguments rest entirely upon the patently false allegation that the parol evidence rule was not an issue at the trial court level. In fact, the parol evidence rule was raised at summary judgment, in the parties' respective trial briefs, and during the objections to jury instructions. Petitioners have raised the alleged insufficiency of respondents' parol evidence objections on at least three different occasions before the Alaska Supreme Court, and on each occasion Petitioners' arguments have been rejected. For this Court to reach Petitioner's due process claim, it would first have to overrule the Alaska court's repeated holding that the parol evidence rule was an issue at the trial court level. This determination by the Alaska court, however, does not raise a federal question and is not subject to review by this Court.

This argument is a straw man because, even though the application of the parol evidence rule may have been "an issue at the trial court level," it ceased to be an issue when the School

District abandoned it *at* trial, i.e., following the empaneling of the jury and the commencement of taking evidence. ADF acknowledges that the School District's summary judgment motion, its trial brief, and its originally proposed Instruction 29 — all of which were submitted prior to the first word of testimony being taken — arguably urged a traditional application of the parol evidence rule. Certainly, to that extent, the parol evidence rule may have been "an issue at the trial court level," and ADF has not suggested that there is any need to overrule the Alaska Supreme Court with respect to such a holding. Nevertheless, a federal due process issue still remains.

The School District's argument sidesteps the essence of ADF's argument which is that at the two critical times, *i.e.*, when during trial (1) evidence was being offered and (2) the jury was being instructed, ADF *abandoned* its earlier reliance upon the traditional parol evidence rule and *acquiesced* in the non-application of the rule. The School District *does not deny* that it never made parol evidence objections, *nor does it deny that it approved Instruction No. 18* which stated that:

> Depending upon how you weigh the evidence, the contract between the parties may include terms *different from* or in addition to those contained in the contract documents.

A. 12 (emphasis added).

Nowhere does the School District acknowledge, let alone answer, ADF's argument that Instruction No. 18 reflected either an understanding that the parol evidence rule was a "dead letter" (A. 63) in Alaska, or a stipulation that there was no contract integration which would justify application of the parol evidence rule to bar evidence of terms different from the written integration.

Nor does the School District respond to the observation in ADF's petition that while the School District at the start

of trial had submitted two alternate forms of instruction with respect to contract integration, Nos. 29 (A. 2) and 30 (A. 7), the former of which could be construed as applying a traditional formulation of the parol evidence rule, the School District did not object at time of jury instruction to the failure to give its proposed Instruction No. 29. *See* A. 16-37 (which comprises all of the School District's objections to proposed instructions). Rather, it objected to the failure to give its Instruction No. 30 which expressly recognized the possibility of "proof by a preponderance of the evidence as to [an] interpretation of the contract which is different from the contract as written." A. 7. This proposed instruction was thus also inconsistent (along with No. 18) with an application of the parol evidence rule.

Consequently, the pertinent inquiry is not whether the parol evidence rule was *ever* an issue — ADF has so stipulated and there is no need to reverse any contrary holding by the Alaska Supreme Court — but is rather whether it *ceased* to be an issue because of the School District's actions, including the approval of instructions which were inconsistent with any finding of contract integration or the application of the parol evidence rule.

2. *ADF Does Not Argue That the Alaska Supreme Court Was Precluded From Considering the School District's Parol Evidence Argument on Appeal or That an Appellate Court Cannot Decide Factual Matters (Provided That Minimum Due Process Requirements Are Met).*

The School District demolishes a second straw man at pages 13-14 of its opposition:

> With regard to the trial court's instructions, the Alaska Supreme Court expressly found:
>
> > *The School District preserved its right to raise the parol evidence rule as a point on appeal* by requesting instructions as to the effect of the rule, and by

> objecting to the court's failure to give parol evidence rule instructions.[1]
>
> *Lower Kuskokwim*, 734 P.2d at 64, n. 1.
>
> Since the issue of whether the parol evidence rule had been raised at trial does not present a federal question, ADF may not request this Court to redecide it.

(Emphasis added).

It is true that ADF unsuccessfully argued to the Alaska Supreme Court that it should not, under its own rules and precedent, consider the School District's parol evidence appeal arguments. But, ADF has not sought review by this Court of any such ruling, for it concedes that the Alaska Supreme Court is certainly the final arbiter of what its rules and cases do or do not allow. However, ADF does insist that once the Alaska Supreme Court determines that review of an issue is appropriate, it must in all events decide that issue in a fashion which comports with due process. This it failed to do.

The School District at pages 14-15 demolises a third straw man when it correctly notes that, from a constitutional standpoint, there is no bar to a transfer of the fact finding function from a trial to an appellate court. The due process problem arises, however, when the fact finder — be it the trial or appellate court — makes its finding on the basis of a record wherein a litigant has not had the proper opportunity or occasion to present its evidence. *See, e.g., Saunders v. Shaw*, 244 U.S. 317,

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[1] The "objection" of the School District to the court's "failure to give parol eivdence instructions" itself contemplated the possibility of the jury's adopting "an interpretation of contract different from the written document." A. 29. *See* generally A. 28-30 and the School District's objection to instruction No. 19 (A. 13-15). In sum, in its approval of instruction No. 18 (A. 12), its objection to No. 19 (A. 13-15), and in its own proposed No. 30 (A. 7-10), the School District acquiesced in instructions which were inconsistent with the application of the parol evidence rule as subsequently made by the Alaska Supreme Court.

37 S. Ct. 638, 61 L. Ed. 1163 (1917); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S., 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930). Thus, ADF's argument is that *no* court, including the Alaska Supreme Court, could on the present trial record make a finding of integration.

3. ADF Does Not Contend That It Was a Denial of Due Process for the Alaska Supreme Court to Make Any Change in the Application of the Parol Evidence Rule, or That it Had a Property Interest Inherent in the Application of Existing Rules of Contract Interpretation.

At pages 17-19, the School District correctly notes that, even if the Alaska Supreme Court changed the law of parol evidence, it could properly do so because no party has a vested interest in having all general propositions of law once adopted remain unchanged, including rules of contract interpretation. ADF agrees. On the other hand, however, fact finding cannot be made with respect to an issue as to which a party has not had a proper opportunity or occasion to present its evidence. *See, e.g., Saunders, supra.*

B. ADF Was Denied Due Process Because — On The Undisputed And Undeniable Record — ADF Never Had A Proper Occasion Or Opportunity To Litigate The Factual Issue Of Contract Integration.

1. The School District Impliedly Stipulated to the Absence of a Contract Integration.

We again reiterate the single undeniable fact, utterly ignored by the School District's opposition brief, that the School District approved Instruction No. 18, which expressly contemplated the possibility of proof of terms "different from" those contained in the written contract. That fact, in and of itself, explodes the contention that there was a burden or

responsibility resting on ADF to prove the absence of a contract integration. For the School District, there is no escape: by acknowledging that terms "different from" the contract could be found by the jury, it necessarily stipulated the absence of a contract integration which would require application of the parol evidence rule.

2. ***Although the Alaska Supreme Court Could Properly Allow the School District to Make a Parol Evidence Argument on Appeal Notwithstanding the Lack of Evidentiary Objections, It Could Not — Consistently With Due Process — Deny ADF the Proper Occasion and Opportunity to Litigate That Issue Which Would Have Arisen Only Upon the Making of Those Evidentiary Objections.***

The School District at page 13 of its opposition brief points out that the Alaska Supreme Court allowed it to raise its parol evidence argument on appeal, notwithstanding the lack of evidentiary objections at trial, because the parol evidence rule is one of substantive law. Yet the School District also recognizes at page 12 that the factual issue of integration "is decide[d] [as] a matter preliminary to the introduction of evidence at trial." In other words, no occasion arises to litigate the issue of integration until someone makes a parol evidence objection. Therefore, it follows that the proper remedy to which the School District was entitled, after it was determined by the Alaska Supreme Court that it could still raise a parol evidence argument on appeal, *was a new trial. Significantly, the School District on appeal only asked for a new trial.* At such a trial, the issue of integration could be litigated, and if an integration was found to exist, then the parol evidence rule could be applied. Instead, the Alaska Supreme Court dispensed with the necessity for trial of the issue of integration and summarily took away ADF's $10 million judgment. That was a denial of due process.

3. Because ADF Was Denied A Proper Opportunity or Occasion to Litigate the Issue of Integration, the Mere Assertion by the School District and the Alaska Supreme Court That All Relevant Evidence Was Presented Itself Highlights the Denial of Due Process.

At pages i, 15 and 16, the School District *nakedly asserts* — as did the Alaska Supreme Court — that all of ADF's evidence on the issue of contract integration was received into evidence anyway, in connection with the proof of the prior agreement, notwithstanding the School District's lack of evidentiary objection and its implied stipulation of non-integration. ADF submits that this argument is outrageous and highlights the lack of due process which prompted the trial court to say that the Alaska Supreme Court result "stinks." A. 65.

Nowhere does the Alaska Supreme Court or the School District answer ADF's question (*see* petition at p. 23) as to how they can *know* that all evidence was submitted with respect to an issue which the trial court twice emphasized (A. 66, Supp. A. 5) was *not litigated.* They also ignore and fail to answer the question of why ADF should have undertaken to prove the fact of *non*-integration when the School District: first, never made the evidentiary objection which alone would have necessitated a finding as to integration; and second, approved instructions which — even granting the full vitality in Alaska of the parol evidence rule — impliedly stipulated the absence of an integration.

The consequence of all this is that the Alaska Supreme Court not only *ignores* evidence which *is* in the record which would support a finding of non-integration (*see* petition at pp. 3–5 and 24–25), but *rejects out of hand* the possibility that even more evidence contrary to its original finding of integration might be available if it should allow an evidentiary proceeding.[2]

Frankly, this suggests a result-driven analysis and itself epitomizes the due process denial of which ADF complains.

[2] The School District faults ADF for not presenting all of its evidence in its rehearing petition to the Alaska Supreme Court following

(footnote continued on next page)

III. CONCLUSION

Once again, we quote the trial court:

> ADF relied on statements made by a government representative as to the way things were going to be at a pre-bid conference, those statements were admitted at trial, and nevertheless, ADF has to eat its losses. It's not fair. It's constructive fraud, it stinks, and it's not the way this case ought to be decided but my hands are tied. So, that's it.[3]

A. 65.

We ask this court to review a gross injustice and a denial of due process.

Respectfully submitted this 7th day of December, 1989.

OLES, MORRISON & RINKER

By STUART G. OLES*
ARTHUR D. McGARRY
DOUGLAS S. OLES

Attorneys for Petitioners
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[2] the first appeal, or to the trial court on remand, or on the second appeal. The answer is that none of these proceedings were evidentiary in nature. ADF can only do what it has unsuccessfully done to date, *i.e.* request an opportunity to litigate the issue.

[3] The School District argues that this Court should not entertain ADF's due process argument because it was not presented to the trial court on remand. Yet, it was the trial court which itself identified and complained as to the basis of the due process denial. The School District also argues that the issue should have been raised in ADF's rehearing petition on the first appeal. But ADF did there insist that further evidentiary proceedings were required before a finding could properly be made as to integration. School District App. 6.

SUPPLEMENTARY APPENDIX

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)
Plaintiff,	)
v.	)
LOWER KUSKOKWIM SCHOOL DISTRICT,	)
Defendant.	)

Case No. 3AN-82-280 Civil

SUPPLEMENTARY APPENDIX - 2

VOLUME I

TRANSCRIPT OF M.O. GRANTING DEFENDANT'S MOTION FOR JUDGMENT AND COSTS; M.O. DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

BEFORE THE HONORABLE MILTON M. SOUTER
Superior Court Judge

Anchorage, Alaska
September 4, 1987
3:20 o'clock, p.m.

P R O C E E D I N G S

THE CLERK: . . . . is now in session.

THE COURT: You may be seated. The court has before it case number 82-280. Alaska Diversified Contractors, Inc. and Fischbach & Moore of Alaska, Inc. d/b/a Alaska Diversified/Fischbach, a joint venture, versus Lower Kuskokwin School District. Counsel are present on both sides. This case is an old friend or an

old enemy depending on how I look at it. It's old.

And it's back here after a successful appeal to the Supreme Court by the plaintiff. And the question is how successful was the appeal to the Supreme Court. A question which the Supreme Court left a little bit vague, at least there's room for argument on that score.

The case is here after remand from the Supreme Court. On cross motions, in essence, seeking the entry of judgment with one of the cross motions seeking alternatively a limited retrial, that cross motion being a portion of ADF's cross motion.

As head counselor here for Lower Kuskokwin School District, Mr. Friedman and Mr. Nourse. And for--you've lost weight, Mr. Nourse, you look different.

MR. NOURSE: I did shave my moustache off, Your Honor.

THE COURT: Well, that's it. All right.

MR. HARRIS: I wish you could say that about me, Your Honor, but I haven't lost any weight at all.

THE COURT: I also thought he looked younger, but that couldn't be with three years having gone by, whatever it is here. And Mr. Harris and Mr. Douglas Oles are here for ADF.

This has been briefed, you know, pretty thoroughly as is true of most everything that was at issue in this case at one time or another. And I've been over it quite thoroughly also, and have given it, you know, some fair amount of thought already. And there are some--certainly some difficult issues here. And if I

might just lay out what some of my concerns are before we start with oral argument.

It seems to me we have presented here a question of whether or not Section Restatement 2nd 90 (ph) of the Restatement of Contracts part one, paragraph one, may be applicable in a case where the parole evidence rule has held to be applicable. The Supreme Court of Alaska in this case setting as a supra trial (ph) court went ahead and decided a factual issue which wasn't even decided in the court below. It found an integrated contract in a contract where there wasn't even an integration clause. Something I've never even seen happen in any case. But, they did it. I'm bound by it. So be it.